Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ROBERT H. BARRETT,
Petitioner,

v.

BOROUGH OF CARLISLE,
Respondent.

On Petition For Writ Of Certiorari
To The Commonwealth Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI
Volume 1

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29 pp

QUESTIONS PRESENTED

1. Whether property owners were deprived of rights to due process of law by the Pennsylvania Historical and Museum Commission in alleged historic certification proceedings, in violation of 42 U.S.C. § 1983?

Proposed Answer: In the Affirmative

2. Whether property owners were deprived of rights to just compensation by the Borough of Carlisle for regulating property within the Carlisle Historic District, absent valid historic certification, in violation of 42 U.S.C. § 1983?

Proposed Answer: In the Affirmative

3. Whether Petitioner was deprived of Fourth Amendment rights to be secure in his properties and papers against unreasonable searches by the Court of Common Pleas of Cumberland County, Pennsylvania, Bayley, J., who issued discovery orders against Petitioner's properties and papers, in violation of 42 U.S.C. § 1983?

Proposed Answer: In the Affirmative

4. Whether Petitioner was deprived of Fifth Amendment rights to just compensation by the Court of Common Pleas of Cumberland County, Pennsylvania, Bayley, J., who through a default judgment against Petitioner appointed an agent to take possession of and to sell Petitioner's properties, in violation of 42 U.S.C. § 1983?

Proposed Answer: In the Affirmative

PARTIES TO PROCEEDING

In addition to the parties named in the caption, the Pennsylvania Historical and Museum Commission (a state agency) allegedly certified the Carlisle Historic District, thereby, establishing the basis for subsequent harm by Respondent, the Borough of Carlisle.

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3. AMENDED FINAL DECREE of the Court of Common Pleas of Cumberland County, Pennsylvania at No. 98-4145 Equity Term, dated January 24, 2000, which entered a default judgment against Petitioner and, *inter alia*, appointed an agent to take possession of and to sell eight (8) improved properties owned by Petitioner (*See* Appendix C).

4. ORDER OF COURT of the Court of Common Pleas at No. 98-4145 Equity Term, dated October 13, 1999, which committed Petitioner to county prison for civil contempt of court (*See* Appendix D).

5. ORDER OF COURT of the Court of Common Pleas at No. 98-4145 Equity Term, dated July 07, 1999, which committed Petitioner to county prison for civil contempt of court (*See* Appendix E).

6. OPINION IN SUPPORT OF ORDER DATED JUNE 03, 1999 of the Court of Common Pleas at No. 98-4145 Equity Term, dated June 23, 1999, which directed Petitioner to respond to Respondent's discovery requests (*See* Appendix G).

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8. ORDER OF COURT of the Court of Common Pleas at No. 98-4145 Equity Term, dated April 23, 1999, which denied Petitioner's subpoena for historic district certification records (*See* Appendix H).

JURISDICTION

On July 22, 1998, Respondent filed a civil action against Petitioner in the Court of Common Pleas of Cumberland County, Pennsylvania at No. 98-4145 Equity Term. On January 24, 2000, the Court of Common Pleas entered a default judgment against Petitioner.

On February 22, 2000, Petitioner filed an appeal in the Commonwealth Court of Pennsylvania at No. 423 C.D. 2000, which Court affirmed the Court of Common Pleas default judgment against Petitioner on August 23, 2000.

On September 21, 2000, Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, Middle District at No. 692 M.D. Allocator Docket 2000, which Court denied the Petition on January 08, 2001.

The United States Supreme Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions, which are set out in Appendix O:

1. The Fourth Amendment to the United States Constitution.

2. The Fifth Amendment to the United States Constitution.

3. The Fourteenth Amendment to the United States Constitution.

4. 28 U.S.C. § 1257(a)

5. 42 U.S.C. § 1983

STATEMENT OF THE CASE

This is the second of five (5) related cases working through State and Federal Courts to the Supreme Court of the United States for writ of certiorari. The first case was docketed at No. 00-977. The recurring issue in each of these cases is the deprivation of rights to due process of law and just compensation, secured by the Fifth and Fourteenth Amendments to the United States Constitution, under color of state law, in violation of 42 U.S.C. § 1983. These violations began during alleged historic certification proceedings by the State Historical and Museum Commission (herein, "the State Commission") in establishing the Carlisle Historic District (herein, "the Historic District"). The violations continued through subsequent regulation of property within the Historic District, by Respondent, the Borough of Carlisle (herein, "the Borough"), including regulation of the simple appearance of property, the issuance of citations against property in the absence of public fire, safety or health hazards, the condemnation of buildings without valid cause, and the denial of building and demolition permits for refusal to submit to historic board reviews.

In the immediate State equity action brought by the Borough, Petitioner, Robert H. Barrett (herein, "Barrett"), was further denied Fourth Amendment rights by the Court of Common Pleas of Cumberland County, Bayley, J. (herein, "the Trial Court"), which ordered Barrett to allow warrantless searches of his properties and papers under discovery proceedings. (*See* Appendices F and G) The Trial Court further violated Barrett's Fifth and Fourteenth Amendment rights by entering a default judgment against him and

appointing an agent to take possession of and to sell Barrett's improved properties for refusing to allow warrantless searches of his papers and for refusing to comply with local historic district regulations. (*See* Appendix C)

In each of these cases, Barrett avers that the Borough regulates property within the Historic District in the absence of valid historic certification. Barrett avers that the Historic District is not valid and cannot be regulated under State law because it has not been certified as historically or architecturally important by the State Commission. Although the Borough alleges that the Historic District was certified by the State Commission, there is no factual evidence that the State Commission ever conducted certification proceedings or certified the Historic District. If the State Commission, in fact, conducted any kind of certification proceedings, property owners were denied procedural and substantive due process of law during those proceedings, were unaware that an historic district was being established, were unaware that their properties were to be included in the proposed Historic District, and were unaware of the regulatory taking of their property rights. Barrett avers that regulation of property within the Historic District, absent valid historic certification which included affording property owners substantive and procedural due process of law, constitutes an unlawful regulatory taking of property rights under the Fifth and Fourteenth Amendments to the United States Constitution. Barrett also avers that property owners are entitled to just compensation for the taking of their property rights when the historical or architectural importance of their property has not been established.

In the first case which Barrett appealed to the Supreme

Court of the United States at No. 00-977, the United States District Court for the Middle District of Pennsylvania dismissed Barrett's complaint based on alleged *res judicata* of the issue in State Courts. Barrett avers that the State Courts denied judicial review of the historic certification and dismissed his appeal based on an incorrect interpretation of the decision of the United States Supreme Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978). The State Courts incorrectly interpreted Penn Central to mean that historic designation is **never** a Fifth Amendment taking, even when property owners were denied procedural and substantive due process of law in historic certification proceedings. Under the State's interpretation of Penn Central, the State Commission may certify, and local government may regulate, any property under the guise of historic preservation without notification of the property owner or other rights of due process.

In the immediate case, Barrett was twice committed to county prison for civil contempt of court. (*See* Appendices D and E) In the first instance, Barrett was committed indefinitely for refusing to allow the Borough to conduct warrantless searches of his improved properties under a discovery order issued by the Trial Court. After forty-one (41) days imprisonment under lock-down conditions, Barrett agreed under duress to allow the searches in order to return to his position with the Federal government.

In the second instance, Barrett was again committed indefinitely to county prison, under lock-down conditions, by the Trial Court for refusing to allow warrantless searches of his papers and refusing to answer interrogatories concerning his financial status. While in prison, Barrett was forced to

retire from his Federal position in order to maintain his financial obligations through a retirement annuity. After forty (40) days, Barrett was released under threat that the Trial Court would enter a default judgment against him if he failed to provide the requested financial information. On January 14, 2000 (subsequently amended on January 24, 2000), the Trial Court issued a default judgment against Barrett in which the Trial Court appointed an agent to take possession of and to sell Barrett's eight (8) improved properties for refusing to allow warrantless searches of his papers and refusing to comply with Historic District regulations.

The Commonwealth Court of Pennsylvania subsequently affirmed the decree of the Trial Court and denied Barrett's appeal. (*See* Appendix B)

Barrett filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court which denied the petition on January 08, 2001. (*See* Appendix A)

REASONS FOR GRANTING THE WRIT

Introduction.

Within the Commonwealth of Pennsylvania, the designation of "historic districts" has evolved into a scheme by which local governments take control of tens of thousands of properties under the **pretense** of preserving historically or architecturally important properties. With few exceptions, such as Philadelphia's Independence Hall, most Pennsylvania historic districts contain little or nothing of historical or architectural importance. Most historic districts are typically composed of common, older buildings in areas where local governments want to increase the tax base. There is no lawful basis for most Pennsylvania historic districts. Local governments regulate historic districts just as homeowners' associations regulate housing developments. "Historic boards" are appointed which dictate the simple appearance of property. However, the significant difference between homeowners' associations and government regulation of historic districts is that home owners agreed as a condition of sale to the contractual arrangement with the homeowners' association. In most historic districts, property owners were never given a choice in the matter. Barrett has owned property in the area designated as the Historic District for over thirty (30) years, and before the alleged certification of the district. When the Historic District was established, all exterior property rights were summarily taken without due process of law by the State Commission and by the Borough. In a thirteen (13) block area with over a thousand (1,000) properties, property owners summarily lost all property rights to the exterior of their property. Property owners within the Historic District never knew that the Historic District was

established until years later. Where property is truly historically important, such action might be lawful if just compensation were paid for the taking of property rights. However, in the Historic District, at issue in this case, there is no factual evidence of any properties which are truly of historical or architectural importance to justify the wholesale regulatory taking of property rights which has occurred in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

I. **Pennsylvania State Courts incorrectly interpreted the decision of the United States Supreme Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978) to deny that historic certification constitutes a Fifth Amendment "taking" when property owners are denied procedural and substantive due process of law before the certifying authority in historic certification proceedings.**

In Penn Central the property owners were the Penn Central Transportation Co., et al., and the property at issue was Grand Central Terminal in New York City. In Penn Central, the United States Supreme Court held:

> "On this record, we conclude that the application of New York City's Landmarks Law has not effected a 'taking' of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare, and not only permit reasonable beneficial use of the landmark site, but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."

Pennsylvania State Courts have ignored the case specific conditions inherent in this decision and mistakenly concluded that historic certification is **never** a Fifth Amendment "taking. Pennsylvania State Courts subsequently concluded that property owners do not have a right (1) to procedural and substantive due process of law before the certifying authority during historic certification proceedings, and (2) to subsequent judicial review of historic certification.

The Pennsylvania State Courts ignored essential conditions of Penn Central. In Penn Central:

(1) Property owners were afforded due process of law because they were notified in advance that the New York City Landmarks Preservation Commission proposed to certify Grand Central Terminal as a landmark site and were provided an opportunity to review and challenge the criteria and evidence supporting such certification.

(2) Although the owners opposed the certification before the New York City Landmarks Preservation Commission, they did not seek judicial review of the final certification. The owners thereby let stand the assumption that sufficient evidence existed to support the landmark certification.

In contrast, the Pennsylvania State Courts improperly denied that historic certification and regulation of the Carlisle Historic District constituted a Fifth Amendment "taking," even though property owners were denied procedural and substantive due process of law during historic certification proceedings before the State certifying authority.

In fact, a complete and accurate reading of Penn Central

establishes that historic certification must be based on a Constitutionally valid certification process which (1) affords property owners due process of law before the certifying authority and (2) establishes a valid historical or architectural basis for certification. Only after the property owner has been afforded due process before the certifying authority, and after a valid basis has been established for historical or architectural importance of the proposed property, can the property finally be certified as historic. Penn Central establishes that a Fifth Amendment "taking" does not occur when property is first certified as historic based on a constitutionally valid historic certification process which afforded property owners due process of law. But Penn Central does not eliminate the requirement that historic certification proceedings must first be conducted which afford property owners procedural and substantive due process of law before the certifying authority.

Where property owners are denied substantive and procedural due process of law in historic certification proceedings, the conclusions of those proceedings are Constitutionally defective and cannot serve as a basis for regulating property and the taking of property rights. Absent the opportunity for property owners to review historic certification criteria, to review evidence supporting the historical or architectural importance of proposed property, and to challenge historic certification, the historic certification process violates the substantive and procedural due process protections of the Fifth and Fourteenth Amendments and constitutes an unconstitutional, regulatory "taking" of property rights.

II. Pennsylvania State Courts denied judicial review of historic certification proceedings, including final historic certification.

Pennsylvania State Courts refused to review the historic certification of the Carlisle Historic District, and the subsequent "taking" of property rights through property regulation. Ignoring the fact that property owners were denied due process of law and never notified of the proposed certification, or afforded an opportunity to review certification criteria, or to review any substantial supporting evidence, or to file objections to the proposed designation or to seek judicial review of final historic certification, Pennsylvania State Courts claimed that the time for reviewing the historic certification was within thirty (30) days of the certification. The Pennsylvania State Courts completely ignored the fact that most property owners never knew of the historic certification until years later.

It is a well-settled matter of law that a statute of limitations cannot begin to run until the claim itself accrues. A cause of action does not accrue until a wrongful act causes injury to the party. The United States Supreme Court has repeatedly held, as it did in 1980, that a Fifth Amendment claim for just compensation is not "ripe," and therefore cannot be adjudicated, until a regulation has been specifically applied to the property and has caused specific harm, Gains v. City of Tiburon, 447 U.S. 255 (1980). In the present case, the claims under the due process and "takings" protections of the Fifth Amendment did not become "ripe" until the Borough of Carlisle refused to issue Petitioner permits based on Historic District regulations.

In denying judicial review of the historic certification,

Pennsylvania State Courts improperly denied Petitioner's right of due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

III. **The Court of Common Pleas of Cumberland County, Bayley, J., violated Petitioner's rights under the Fourth Amendment in issuing a discovery order allowing Respondent to search Petitioner's properties and papers.**

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

At issue is whether court-ordered discovery through administrative "inspections," production of documents, and disclosure of financial information through interrogatories constitutes searches within the meaning of the Fourth Amendment to the United States Constitution? Petitioner argues that such "inspections" and demands for information are, in fact, searches under the Fourth Amendment and are subject to the warrant procedures of the Fourth Amendment.

On June 01, 1999, the Trial Court heard on-record argument on the Borough's motion to compel compliance with their discovery requests, including the Borough's request for entry upon Barrett's properties. At that hearing, the Borough presented no statement of facts or evidence

against Barrett's properties to establish probable cause for general entry upon all eight (8) of Barrett's improved properties. Further, the Borough presented no argument for entry upon any individual property owned by Barrett and established no probable cause for such action. And, the Borough presented no argument for entry upon Barrett's personal residence at 136 East High Street and established no probable cause for such action. The Borough did not establish probable cause for searching Barrett's properties, and the Trial Court did not issue Warrants.

On June 14, 1999, Barrett filed a Complaint in the United States District Court for the Middle District of Pennsylvania at Civil No. 1:CV-99-997. In the Federal Complaint, Barrett averred that the inspections ordered by the Trial Court constituted "searches" under the Fourth Amendment to the United States Constitution, were ordered without probable cause, and violated his right to be secure in his property against unreasonable searches. Barrett requested the U.S. District Court vacate the June 03, 1999 discovery order of the Trial Court. On June 27, 1999, the U.S. District Court dismissed the complaint for lack of jurisdiction.

On June 21, 1999, Barrett filed a Notice of Appeal to the Pennsylvania Commonwealth Court of the June 03, 1999 discovery order of the Trial Court. Barrett averred that his appeal was an Interlocutory Appeal as of Right made under Pa.R.A.P. 313, Collateral Orders. On July 19, 1999, the Commonwealth Court of Pennsylvania quashed Barrett's appeal on grounds that it was interlocutory and not otherwise appealable.

Barrett was subsequently incarcerated in the Cumberland County Prison under lock-down conditions for

forty-one (41) days for refusing to allow the searches. Only after Barrett agreed, under duress, to the searches was he released from prison.

Barrett was again incarcerated under lock-down conditions for another forty (40) days for refusing to allow warrantless searches of his papers and for refusing to answer interrogatories about his financial status.

Courts are not exempt from the provisions of the Fourth Amendment to the United States Constitution. Nor are discovery actions in lawsuits exempt from the provisions of the Fourth Amendment to the United States Constitution. Constitutionally protected areas, including property, papers, and effects, are subject to the protections guaranteed under the Fourth Amendment to the United States Constitution. Judicial discretion does not include the right to violate Constitutional protections. Barrett avers that the discovery "inspections" ordered by the Trial Court constituted "searches" subject to Fourth Amendment protections, which required a finding of probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The Trial Court failed to issue warrants based on probable cause for the searches of Barrett's properties, and Barrett avers that the Trial Court, thereby, violated his right to be secure in his property and papers against unreasonable searches. As a consequence, Barrett's refusal to submit to violations of his Constitutional rights by the Trial Court does not establish a basis for civil contempt of court and his subsequent imprisonment.

IV. **The Court of Common Pleas of Cumberland County, Bayley, J., violated Petitioner's rights under the Fifth and Fourteenth Amendments in appointing an agent to take possession of and to sell Petitioner's improved properties.** (*See* Appendix C)

The Trial Court entered a default judgment against Barrett, which Amended Final Decree appointed an agent to take possession of and to sell Barrett's eight (8) improved properties in the absence of any factual evidence supporting the Borough's Complaint.

For years, the Borough has perjured itself before this Trial Court in an effort to regulate the simple appearance of Barrett's properties and to prevent Barrett from demolishing buildings within the Historic District in order to create adequate parking for tenants. The Borough has falsely claimed that Barrett's properties constitute public safety hazards, that properties would collapse, that windows would fall out, that firemen could fall from porches, that roofs would collapse, and that electrical explosions would occur. In fact, in over thirty (30) years of owning property in Carlisle, no one has ever been injured as a result of the condition of Barrett's properties and no tenant has ever filed a complaint concerning Barrett's properties. Most of the alleged violations against Barrett's properties were against buildings which Barrett had applied to demolish and been refused by the Borough. While refusing to issue Barrett demolition permits, the Borough continued to cite Barrett for property maintenance violations against the very buildings he was trying to demolish.

With respect to the personal and financial information which the Trial Court ordered Barrett to produce, there is no

requirement in law that Barrett have, maintain or make public any of the information demanded by the Trial Court:

a. There is no requirement in law that Barrett earn a specified annual income in order to own property.

b. There is no requirement in law that Barrett spend a specified amount of money to maintain his properties.

c. There is no requirement in law that Barrett have insurance for his property.

d. There is no requirement in law that Barrett have written leases.

e. There is no requirement in law that Barrett keep business records.

f. There is no requirement in law that Barrett keep receipts.

g. And there is no requirement in law that Barrett make any of the about information available to the public, the Borough, or the Trial Court.

The Building Officials and Code Administrators (BOCA) National Property Maintenance Code to which the Trial Court referred in its Opinion and Final Decree dated January 24, 2000 is intended to protect the public from fire, safety, and health hazards. The BOCA Code cannot lawfully be used to regulate the simple appearance of property.

The Borough, however, in collusion with the Trial Court uses the BOCA Code to unlawfully regulate the simple appearance of properties within the Historic District in the absence of public fire, safety or health hazards. Regulation of the simple appearance of property is a "taking" of property rights in violation of the Fifth and Fourteenth Amendments to

the United States Constitution.

The Trial Court exceeded its authority in appointing an agent to take and to sell Barrett's properties. The Trial Court's default judgment is based solely on Barrett's refusal to give up his Constitutional rights under the Fourth Amendment. The Trial Court failed to establish that the searches ordered were reasonable and that they were essential to the immediate action. The Borough admitted in its Complaint that no laws had been broken. The Borough further failed to establish that any harm had been done to the Historic District or to individual property owners. In fact, the thinning of properties within the Historic District is absolutely necessary to the viability of the Historic District. The significant loss of business in the downtown area is the direct result of lack of adequate parking, excessive real estate prices, and egregious Borough regulations.

The Trial Court in the immediate action and in related cases before it has taken the following actions:

(1) Colluded with the Borough to regulate the simple appearance of property within the Historic District;

(2) Denied a subpoena against the State Commission to produce its records of the alleged certification of the Historic District (*See* Appendices H and I);

(3) Denied judicial review of the alleged State certification of the Historic District;

(4) Denied that property owners have a right to due process of law before the historic certifying authority based on the Trial Court's incorrect interpretation of Penn Central Transportation

Company v. New York City;

(5) Denied review of the Historic District certification based on expiration of the statute of limitations in violation of Gains v. City of Tiburon;

(6) Violated Barrett's Fourth Amendment rights by ordering warrantless searches of his properties and papers;

(7) And taken Barrett's properties through appointment of an agent to take possession of and to sell his properties.

In a telling verbal exchange over objections to questioning between the Trial Judge and the Solicitor for the Borough at a hearing in a related State case, the Trial Judge stated as follows, "Don't forget that it was this Court that saved the Carlisle Historic District."

CONCLUSION

This case raises constitutional issues involving the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and the decision of the United States Supreme Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978). These issues have been decided by the State Courts in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

For the reasons set out, Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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